In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 62

FEDERAL TRADE COMMISSION, PETITIONER

v.

COLGATE-PALMOLIVE COMPANY AND TED BATES & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

The Commission is filing this brief in reply to the contentions of respondents that the writ of certiorari should be dismissed or the decision below affirmed on the ground that the Commission failed to comply with, or seek review of, the first decision of the court of appeals.

1. On its original review, the First Circuit had before it an order which might be read literally to prohibit the respondents from using any substitute or mock-up in any television commercial. It forbade them, "in describing * * * the qualities or merits of any product"—which is what every commercial does—from representing even by implication that pictures

752-181—64

shown were genuine depictions of the product when they were not (R. 7–8). In seeking review of this order, both respondents argued to the court of appeals that the order was in no sense limited to representations involving a test or experiment.[1] They voiced their serious concern that the Commission's order would forbid almost every use of mock-ups or substitutes. After some initial hesitation the Court concluded that (R. 40) "[o]n consideration we agree with respondents that the order may be read as forbidding such conduct." "To be doubly sure" that its "understanding of the Commission's position was correct," the court asked Commission counsel whether the order would forbid use of an artificial substance in a commercial showing a prominent person enjoying iced tea; counsel answered that it would be forbidden, thus confirming the court's apprehensions as to the intended scope of the order (R. 40).

With this question as to interpretation resolved, the First Circuit set aside the order, holding that the devices necessary for conveying accurate product claims are generally matters of indifference to television viewers: "What the viewers are interested in, and moved by, is what they see not by the means" (R.

---

[1] Brief of Ted Bates, pp. 33, 35; Reply Brief of Colgate-Palmolive, p. 18. Respondent Bates, for example, stated (at p. 35): "What was actually involved in this case was a particular *type* of visual demonstration—what is described as a sandpaper 'test.' Clearly, an *experiment* or *test* such as this is wholly unrelated, for example, to simple depictions of a product—in which photographic techniques must often be used to achieve accuracy—or to mere dramatic scenes, in which the use of actors and props is reasonable and necessary."

40). It is important to note, however, what the First Circuit did *not* consider and did *not* hold. The court's attention was not directed to the question of the materiality of a misrepresentation that certain product claims have been verified by some form of objective proof—for example, by a visual test or the certification of an independent testing agency. Nothing in the court's opinion suggested that such misrepresentations are never in themselves deceptive trade practices. And the court plainly did not overturn the Commission's finding that the respondents had falsely represented that they were furnishing visual, experimental proof of the moisturizing capacity of Rapid Shave.

The court of appeals remanded the case to the Commission for further proceedings in accordance with its opinion, *i.e.*, to prepare a new order consistent with the opinion (R. 33, 42–43). This mandate, which required only that the Commission respect the grounds of the court's decision, left it free to discharge what this Court has held to be the duty of an administrative agency on remand: "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. [Citation omitted.] But an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145. The Commission was bound to respect the rules

of law laid down by the court on review but, equally, "[a]fter the remand was made * * *, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201.

We believe that the Commission's actions on remand were fully consistent with the court's opinion.[2] The Commission's second decision made clear that it was relying upon a different and far more limited theory than the general prohibition of mock-ups rejected by the court of appeals. Its restated position is simply that one of the factors material to purchasers is the basis they have for believing the truth of a seller's claim and that, therefore, any form of false proof is materially deceptive whether or not it involves the use of mock-ups (cf. *Hutchinson Chem. Corp.*, 55 F.T.C. 1942)—indeed, whether it involves an experiment, a testing agency, or any other form of proof. As we have indicated above, this ground of decision was not discussed or considered by the court of appeals which had before it an order apparently directed at the use of mock-ups, rather than false proofs. The Commission's new order is explicit—that the use of mock-ups is not forbidden except insofar as mock-ups are the means of making a

[2] The question of compliance with the lower court's mandate can be resolved by this Court without need of a remand to the First Circuit, which did not rule on the question and whose decision would not, in any event, be binding upon this Court. See *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 227; *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 141.

separate and distinct misrepresentation of experimental proof.[3]

2. We submit, however, that it was not necessary for the court of appeals to resolve the question of consistency of the Commission's second decision with the court's original opinion; and it is not necessary for this Court to undertake that task. When the respondents sought review of the Commission's actions on remand, they pressed upon the First Circuit their contention that the court should decide no more than that the Commission's decision and order were inconsistent with the court's first opinion. The court refused to adopt this approach and stated explicitly that it would re-examine the Commission's position "on the merits rather than from the limited standpoint of whether it comports with our previous opinion" (R. 133). The respondents now urge this Court to undertake review from that "limited standpoint" which the First Circuit declined to adopt, contending, in effect, that the court of appeals abused its discretion in bypassing the question of the Commission's compliance with the mandate. We submit that the court below acted not only within its discretion but also with the wisest regard for the necessity of flexibility in judicial review of administrative proceedings.

The Commission's actions on remand represented a respectful and procedurally sound attempt to obtain a clearer ruling from the court of appeals by clarifying the Commission's own decision and order.

[3] The only reference to mock-ups in the Commission's order on remand is by way of limitation of the scope of its prohibition of sham proofs.

The court's original opinion was, at best, extremely ambiguous as to the propriety of a prohibition of sham experiments represented as proof of a seller's claims. To obtain resolution of this ambiguity—to discover precisely what is the scope of its administrative authority—the Commission undertook to redraft its order so as to present its position to the reviewing court squarely and precisely. This task required a formal opinion by the agency itself; it could not properly be undertaken by counsel on petition for rehearing. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94. The Commission's only alternatives—to authorize a trade practice which it thought was unfair and to which the First Circuit had not expressly directed itself or to seek Supreme Court review although its order was concededly unclear and the court of appeals had never been asked to review an order drawn precisely enough to bring the Commission's views into focus—were plainly less desirable and appropriate.

In the light of this background, the First Circuit's treatment of the question of compliance was sound. If the Commission had flouted or defied its mandate, the court would properly have set aside the Commission's order on that ground and refused to re-examine the Commission's position on its merits. Cf. *Carr* v. *Federal Trade Commission*, 302 F. 2d 688, 691–693 (C.A. 1). However, the mandate had not been exact or self-executing; its meaning had to be inferred from the language of the opinion as a whole and was a matter on which reasonable men could differ. The Commission's interpretation of the court's decision and

mandate was a reasonable one, and its actions on remand were taken in good faith for the sole and proper purpose of assuring that its position would be fully understood, carefully considered, and directly approved or disapproved by the reviewing court. In this context, no rule of law required the court to disregard the ultimate merits of the Commission's restated position and limit review to the question of consistency of that position with the implications of the court's original decision and order. It was free to cooperate with the agency's efforts to obtain a clear and final resolution of a question of administrative importance.

While an appellate tribunal usually will not reconsider its own rulings of law on a subsequent appeal in the same case (*e.g., Morand Bros. Beverage Co.* v. *Labor Board,* 204 F. 2d 529, 532 (C.A. 7)), this principle—the rule of "law of the case"—is not an inexorable command but "only a discretionary rule of practice." *United States* v. *United States Smelting Refining & Mining Co.,* 339 U.S. 186, 199; see Note, 65 Harv. L. Rev. 818, 822 (1952). Especially in the case of administrative orders, judicial review would be deprived of essential flexibility if the rule of "law of the case" were applied mechanically, without regard either to the good faith and reasonableness of the agency's actions on remand or to the benefits of reconsideration in the light of a clarified administrative position. On all the facts of this case, the court of appeals chose to review the agency's new order on its merits, rather than from the narrow and sterile viewpoint of consistency with the implications

of its earlier opinion, which had been written without the benefit of either a sufficiently clear statement of the Commission's position or a precisely delimited order. This choice by the court of appeals was an eminently practical one, promoting the fair and orderly review of administrative decisions. It is not without precedent in the review of Commission decisions. See *A. E. Staley Mfg. Co.* v. *Federal Trade Comm'n*, 144 F. 2d 221, 222 (C.A. 7), reversed on the merits, 324 U.S. 746. And it very plainly involves no violation of any substantive or procedural rights of the respondents. See *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 200–201; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145–146.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

PHILIP B. HEYMANN,
Assistant to the Solicitor General.

JAMES MCI. HENDERSON,
General Counsel,
Federal Trade Commission.

NOVEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964